

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,) File No. 15-cr-199(1)
Plaintiff,) (DSD/FLN)
v.)
Phillip Howell,) Courtroom 14W
Defendant.) Minneapolis, Minnesota
Monday, April 18, 2016
2:01 p.m.

BEFORE THE HONORABLE DAVID S. DOTY
UNITED STATES DISTRICT COURT SENIOR JUDGE
(SENTENCING HEARING)

APPEARANCES

For the Plaintiff: UNITED STATES ATTORNEY'S OFFICE
BY: JEFFREY S. PAULSEN, AUSA
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Minneapolis, Minnesota 55415

For the Defendant: EARL GRAY DEFENSE
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P R O C E E D I N G S

IN OPEN COURT

THE COURT: Good afternoon. Do you want to take your seats, except for those who are going to take part, if they would come up to the podium, please.

This is the matter of the United States versus Phillip Howell.

And may I have appearances, please?

MR. PAULSEN: Good afternoon. Jeff Paulsen for the United States.

THE COURT: Good afternoon.

MR. GRAY: Good afternoon, Your Honor. Earl Gray representing --

THE COURT: Do you want Mr. Howell to come on up, please, too?

MR. GRAY: -- Phillip Howell. He's present and standing next to me.

THE COURT: Mr. Gray, I know that you had a chance to read the presentence report. I have read your materials. And is there anything more about the report itself?

MR. GRAY: No, Your Honor.

THE COURT: Have you gone over that report with Mr. Howell?

MR. GRAY: Yes, sir.

THE COURT: Anything you would like to say on

1 behalf of Mr. Howell as far as allocution goes?

2 MR. GRAY: Yes, Your Honor.

3 THE COURT: Yes?

4 MR. GRAY: I'm not quite sure of the procedure,
5 but I just -- I did file a position paper with respect to
6 Mr. Howell asking that --

7 THE COURT: "Just" meaning when?

8 MR. GRAY: Pardon me, Your Honor?

9 THE COURT: "Just" meaning -- I have a position
10 paper from you that I read.

11 MR. GRAY: Right.

12 THE COURT: That's the one?

13 MR. GRAY: Yes.

14 THE COURT: Okay. Not filed today?

15 MR. GRAY: No, no. I'm not that tardy. After Mr.
16 Paulsen filed his position, I filed a response to that.

17 THE COURT: Yes, you did. I noticed that.

18 MR. GRAY: And my argument, Your Honor, is that
19 this is a gun case. It's 37 to 46 months. He's got one
20 prior felony, and that's a low-level felony in the state
21 court. He got a year and a day, and he did that. With
22 respect to the misdemeanors, he has one misdemeanor in Santa
23 Clara, California, and in that misdemeanor he got 4 points
24 because one of the guns, the first gun, in August, caused
25 him to get 4 points instead of 2. Besides those

1 convictions, Your Honor, he doesn't have much of a record.

2 I don't know when you want me to -- if you want me
3 to address the government's motion now?

4 THE COURT: Sure.

5 MR. GRAY: Okay. Well, the government has filed a
6 motion for 60 months, and it says the Denver case that he
7 had a -- that he had possessed a gun. He's not been
8 convicted of that. There was no gun seen on him. It was a
9 bulge in his pocket, not a gun. There is probable cause for
10 that. I don't dispute that. I'm not disputing the court
11 can take that into consideration. But with respect to the,
12 you know, some of the innuendo in there about the gun
13 wrapped in the handkerchief and that's what criminals --

14 THE COURT: I think it was a sock, by the way.

15 MR. GRAY: All right. Sock, yes. -- and that's
16 what criminals do, that's sort of far-fetched. They also
17 wrap guns in a sock to stop the gun from being rusty and for
18 no accidental discharge.

19 In any event, getting down to the real serious
20 allegation here by the government is that he was involved in
21 this triple homicide, Your Honor, and I filed the newspaper
22 article. The government makes a statement that we have
23 arrested Mr. Howell on a gun charge and he's going to be
24 indicted on a murder case. It never happened. And I would
25 ask the court not to consider evidence, if there is any,

1 from seven years ago that he's never been charged with, not
2 even probable cause for a complaint. And I realize the
3 newspaper can do what it wants with respect to putting your
4 name in there, as far as a suspect, but it shouldn't be
5 helped by the government and then giving statements about my
6 client going to be indicted and he never was and he never
7 will be. So I'd ask the court not to consider that aspect
8 of his background.

9 And then, lastly, which is the last argument of
10 Mr. Paulsen that, oh, and by the way, in state court they
11 get 60 months, that's so far from the truth. They get
12 60 months, but it's 40 months. You get a third off. And
13 then from the 40, you are going to get less time than that
14 if you do some of the programs in state court. So the
15 sentences are about the same.

16 And I'd ask the court to sentence him to the
17 guideline sentence. There's nothing unusual about this
18 case. The key factor here is that the probation office
19 found nothing unusual. The government didn't object to the
20 presentence investigation report. Then all of a sudden
21 after that they bring a motion for a variance and argue
22 innuendo and suspicion and not real facts. The idea that he
23 can be sentenced because he's a suspect in a murder case
24 that's nine years old is just unreasonable and unfair, Your
25 Honor. And I would ask the court to sentence my client

1 within the guidelines, and the median is 40 months.

2 And also -- I'll say it now -- he has a bullet in
3 his leg. He's been suffering from that at the jail for a
4 long period of time. And I would ask that he be allowed to
5 turn himself in. He spent six months on conditional
6 release. He was gainfully employed. He worked. He had a
7 job. He didn't take drugs. He behaved himself for six
8 months, Your Honor. And he did leave for an hour. A dumb
9 thing to do. Stupid. He's not the smartest person in the
10 world with respect to rules, because he's not had that many
11 in his life. But as far as if you did give him voluntary
12 surrender, he would be able to go to the hospital, get the
13 bullet removed before he goes off to do his sentence, so --

14 And I would ask the court also, as far as the
15 prison term, to be at Rochester so that if there's any
16 follow up on the bullet being extracted, it could be done
17 there.

18 THE COURT: Well, and I will make a
19 recommendation. Of course, it can be down there initially
20 too.

21 MR. GRAY: Yes.

22 THE COURT: And maybe a better job because, you
23 know, Rochester Medical Center has a lot of doctors right
24 out of Mayo, and so you may end up with a Mayo doctor if you
25 go to Rochester. So I will make that recommendation.

1 MR. GRAY: Okay. Thank you, Your Honor.

2 THE COURT: Anything else?

3 MR. GRAY: No. That's it. I just -- I've known
4 the guy for a year now, and he seems to have turned his life
5 around with the conditional release. I was very
6 disappointed in him, as he knows, for not -- for leaving for
7 an hour and coming back. He -- I don't think he understood
8 the magnitude of it, Your Honor. Thank you.

9 THE COURT: Okay. Mr. Howell, you get a chance to
10 address the court also, if you wish. Anything you would
11 like to say this afternoon?

12 THE DEFENDANT: I would like to apologize for my
13 actions. I am responsible for my actions. And I've been
14 having time to think, and I have a clear mind. And, yes, I
15 do feel that I should be getting -- getting what I am
16 getting for my consequences. That's not good. I had made
17 not smart decisions and things like that, but that's not who
18 I am, who they say that I am, not who they say I am in the
19 papers, not any of that. And I just like to just to
20 apologize for disrespecting the law in the courtroom, Your
21 Honor, and just work on being a law-biding citizen. So I
22 would like to get a second chance to show I can prove that.

23 THE COURT: Okay. All right. Well, that's what
24 we all hope you will do, is become a law-abiding citizen at
25 some point.

1 THE DEFENDANT: Yes.

2 THE COURT: Okay. Thank you.

3 Mr. Paulsen, on behalf of the government.

4 MR. PAULSEN: Well, if we're going to compare this
5 case to state court, 60 months is what you get in state
6 court for one gun. There's three guns associated with Mr.
7 Howell, and the first one, as you know, was the one in
8 Denver.

9 And when Mr. Gray says it was a bulge, it wasn't a
10 gun, he's not being candid because an officer saw Mr. Howell
11 reach into the waistband and remove that bulge, put it up on
12 a closet shelf and then run out the door. When they went
13 into that closet shelf, they recovered the gun. The bulge
14 was the gun.

15 He's not being held accountable for that gun here,
16 and he probably never will be, because he ran away, he
17 jumped bond on that case in 2012, after using a false name,
18 which is why it was hard for us to find him originally. So
19 he will never be punished for that.

20 I bring that up because if that gun were part of
21 this case, if we had jurisdiction over it, then there would
22 be three or more firearms and there would be a 2-level
23 enhancement and he would be looking at 46 to 57 months under
24 the guidelines. We don't have that because he ran away from
25 that charge, but I throw that out there just to refute when

1 Mr. Gray says this is just one incident with one gun and a
2 minor criminal record. I dispute that.

3 His prior felony, by the way, is assault by
4 strangulation, domestic assault by strangulation. It's a
5 crime of violence, obviously.

6 As far as my references in the pleading to the
7 triple murder, I prosecuted that case. And I don't throw
8 that out there lightly. It is not innuendo. It is not
9 speculation. It is hard evidence. Chris Wilton and I
10 prosecuted that case. And I took the time to review my
11 appellate brief, because it's loaded with the references to
12 Mr. Howell. And two of the victims of that triple murder
13 are in the courtroom today. The mother of the male victim
14 is seated out there in the front row, and the little girl
15 who saw her mother and sister get executed is in the
16 courtroom too. She's grown up now, she's 19, but I think
17 she was about 9 years old then, and she testified at that
18 trial against Lindsey and Raleigh. And the reason I bring
19 it up is because it was not me, but the reporters who
20 covered that trial who called when they saw Mr. Howell had
21 been charged. They called and said, Is this the same Howell
22 from the triple murder case? And we didn't put out press
23 releases. Mr. Gray says and accuses us of unprofessional
24 conduct. The reporter called me to confirm whether it's the
25 same one. And I said yes. And then all I said was he was

1 and is a suspect, and he is, and it is based on speculation,
2 but hard evidence. I summarized it in my pleading. If
3 anybody wanted to go to that trial transcript, they would
4 see it. We also summarized it at the original detention
5 hearing in this case. Basically, his phone was bouncing off
6 the cell tower of the crime scene at the time of the
7 murders, and he was having contact with both Lindsey and
8 Raleigh, the two people that were convicted of those
9 murders.

10 And there was other evidence as well. Raleigh
11 admitted to somebody who testified at trial that it was him
12 and Lindsey and two other guys, one of them was Filthy Phil.
13 That's this defendant. So it's not rumor and speculation.
14 And I understand he hasn't been charged, but the court can
15 consider reliable, credible evidence, and it is reliable and
16 credible.

17 I oppose voluntary surrender. He does have a
18 bullet in his leg. It's because he got shot the day before
19 he committed this offense. And the evidence from the crime
20 scene indicates it was a gun battle, that he shot back. And
21 the next day -- he goes to the hospital and was released
22 right away. And the next day he's out in a car driving
23 around with a .45 caliber gun. Now, what do you suppose he
24 was going to go do? He was going to go retaliate against
25 the person who shot him. And likely the police were on to

1 him. They pulled him over. They caught him with the .45
2 caliber gun that he pled guilty to. So I oppose any release
3 and voluntary surrender, because his behavior indicates that
4 if he had the chance he would probably go try to retaliate.

5 And the thing about him leaving the halfway house
6 for one hour, Mr. Gray says, well, that's the only time we
7 know about, but he got caught that time and he had some
8 excuse about going to some family gathering. There was no
9 evidence ever presented that there was a family gathering.
10 We will never know what he was up to that night, but I don't
11 think he would have run the risk of going back to jail
12 unless it would have been something illegal and nefarious
13 that he had to go do that night.

14 So I am asking for a modest upward variance. I
15 think it's supported both by the guidelines. If that third
16 gun were part of this case, it would be what I am asking
17 for, virtually, but it's supported by his entire history and
18 the way he's behaved on the street and even while at the
19 halfway house awaiting sentencing. I ask for 60 months.

20 MR. GRAY: May I respond, Your Honor?

21 THE COURT: I don't know, Mr. Gray. If you
22 respond, then I have to allow Mr. Paulsen to respond.

23 MR. GRAY: All right.

24 THE COURT: You know, I don't think so. I think I
25 understand what happened, and I think I understand the

1 arguments made by both of you. I'm going to take them both
2 into consideration in my sentence, so --

3 But as you counsel both know, I have to make some
4 findings of fact. In this case the findings of fact haven't
5 been objected to and I will adopt.

6 But defendant objects to the statements in the PSR
7 that he previously served an imprisonment sentence of four
8 months. Defendant asserts that he only served fifteen days.

9 Now, ruling on this objection is not necessary
10 because the controverted facts will not affect sentencing.
11 That's under Federal Criminal Rule 32(i)(3)(B). However,
12 there being no other objections, as I already indicated, the
13 court will adopt the statements in the PSR as its findings
14 of fact.

15 As far as -- excuse me -- as far as the
16 application of the guidelines to the facts, a question has
17 arisen regarding the application of the guidelines.

18 Defendant argues that the presentence
19 investigation incorrectly assigns him two criminal history
20 points for committing the offense in Count 1 of the
21 superseding indictment while on probation. Now, defendant
22 was previously sentenced to a two-year probationary period
23 that ended on April 16th, 2015. On August 8th, 2014,
24 defendant was found in possession of the firearm in Count 2
25 of the superseding indictment. Defendant pleaded guilty

1 only to Count 1, but stipulated in his plea agreement that
2 the firearm in Count 2 could be held or should be held
3 against him for purposes of sentencing pursuant to
4 Guidelines Section 1B1.2(c). And, thus, the presentence
5 investigation report correctly assigns defendant two
6 criminal history points under Guideline Section 4A1.1(d) for
7 committing the offense in Count 2 while on probation. And
8 the court, therefore, will overrule defendant's objection.

9 Accordingly, the court determines that the
10 applicable guidelines are as follows: A total offense level
11 of 19, with a Criminal History Category of III, might lead
12 to an imprisonment range of 33 to 46 months, supervised
13 release of 1 to 3 years, a fine range of 6,000 to \$60,000
14 and a special assessment of \$100.

15 MR. PAULSEN: Your Honor, did you -- I think you
16 might have had the guidelines range wrong. Isn't it 37 to
17 46 months?

18 MR. GRAY: I hate to say it, but I agree with Mr.
19 Paulsen on that.

20 MR. PAULSEN: I thought you said 33 to 46.

21 THE COURT: I said 33 all right.

22 MR. GRAY: It's 37, Your Honor.

23 THE COURT: I'm going to check with probation, not
24 that I don't believe you guys.

25 Does the probation officer agree?

1 PROBATION OFFICER: That is correct, judge.

2 THE COURT: 33?

3 PROBATION OFFICER: 37 to 46.

4 THE COURT: 37 to 46. We will correct that.

5 So would the record please show that it is 37 to
6 46 months.

7 I was about to announce what the statutory
8 requirements are. The statute under which defendant has
9 been convicted sets a maximum term of imprisonment of 10
10 years, a maximum term of supervised release of 3 years and a
11 maximum fine of \$250,000.

12 And, by the way, I should thank you for bringing
13 it up. We didn't want to make a mistake, and I didn't want
14 to just slip over that without thanking both of you.

15 Now, the government has moved for an upward
16 departure or variance, asserting that the guideline range
17 does not adequately reflect defendant's dangerousness or his
18 likelihood to reoffend. The government notes that defendant
19 has been charged in Denver with being a felon in possession,
20 but that authority will not -- but the authorities there
21 will not extradite him. The government also notes
22 defendant's alleged involvement in a triple homicide that
23 occurred in St. Paul in 2007. And, essentially, the
24 government urges the court to punish defendant here for
25 those offenses. Doing so, however, requires the court to

1 rely on facts that have not been proved and raises due
2 process concerns to the court.

3 I am very sorry for the people that are sitting
4 here. I am very sorry that you are here, and I am very
5 sorry that you had to undergo what you did based on whatever
6 you believe happened.

7 But because the court determines that the
8 circumstances of this case do not warrant an upward
9 departure and, therefore, I am going to deny the
10 government's motion.

11 Mr. Howell, you have been charged in Count 1 of
12 the superseding indictment with being a Felon in Possession
13 of a Firearm, in violation of 18 United States Code Sections
14 922(g)(1) and 924(a)(2).

15 And based upon your plea of guilty to that charge,
16 it is considered and adjudged that you are guilty of that
17 offense.

18 And, therefore, it is adjudged that you are
19 committed to the custody of the United States Bureau of
20 Prisons for imprisonment for a term of 46 months.

21 As I have indicated, I will recommend Rochester be
22 the place of confinement.

23 Further, it is ordered that pursuant to 18 United
24 States Code Section 3583 you are to serve a term of
25 supervised release of 3 years under the following

1 conditions:

2 First, you shall report to the U.S. Probation and
3 Pretrial Services Office in the district in which you are
4 released within 72 hours of release from the custody of your
5 imprisonment.

6 Second, you shall not commit any crimes, federal,
7 state or local.

8 Third, you shall not illegally possess a
9 controlled substance. You shall refrain from any unlawful
10 use of a controlled substance. You shall submit to one drug
11 test within 15 days of release from imprisonment and at
12 least two periodic drug tests thereafter as determined by
13 the court.

14 Fourth, you shall not possess a firearm,
15 ammunition, destructive device or any other dangerous
16 weapon.

17 And, fifth, you shall cooperate in the collection
18 of DNA as directed by the probation officer.

19 You shall also abide by the standard conditions of
20 supervised release that have been adopted by the court,
21 including the following special conditions:

22 First, you shall complete an immediate assessment
23 or participate in a program for substance abuse as approved
24 by the probation officer upon release or relapse during your
25 term of supervised release. That program may include

1 further testing and inpatient or outpatient treatment,
2 counseling or support group. Further, you shall continue --
3 I'm sorry -- shall contribute to the costs of such treatment
4 as determined by the Probation Office Copayment Program, not
5 to exceed the total cost of treatment.

6 Second, you shall submit your person, residence,
7 office, vehicle or an area under your control to a search
8 conducted by a United States Probation Officer or supervised
9 designee, at a reasonable time and in a reasonable manner,
10 based upon a reasonable suspicion of contraband or evidence
11 of supervision violation. You shall warn any other
12 residents or third parties that the premises or areas under
13 your control may be subject to searches pursuant to this
14 condition.

15 Third, if not employed in a regular lawful
16 occupation as deemed appropriate by the probation officer,
17 you may be required to perform up to 20 hours of community
18 service per week until employed. And you may also
19 participate in training, counseling, daily job search or
20 other employment-related activities as directed by the
21 probation officer.

22 No fine will be imposed; however, pursuant to 18
23 United States Code Section 3013, you must pay to the United
24 States a special assessment of \$100, which is due
25 immediately.

1 Now, the court finds that the sentence imposed is
2 appropriate and reasonable in light of the considerations
3 set forth in 18 United States Code Section 3553(a). The
4 court has taken into account the nature and circumstances of
5 the instant offense, as well as the history and
6 characteristics of the defendant, and finds that the
7 sentence imposed is sufficient, but not greater than
8 necessary, to afford adequate deterrence to future criminal
9 conduct.

10 No fine will be imposed because of defendant's
11 inability to pay a fine, due to his pending incarceration.

12 The court does now accept the plea agreement in
13 this case because it is satisfied that the agreement
14 adequately reflects the seriousness of the defendant's
15 offense behavior and that accepting the plea agreement will
16 not undermine the statutory purposes of sentencing.

17 Now, Mr. Howell, you can appeal this case, if you
18 wish. You talk with your counsel Mr. Gray, find out what
19 you want to do. If you decide to appeal, you must file a
20 notice of appeal within 14 days of today, otherwise you will
21 give up that right. Do you understand that?

22 THE DEFENDANT: Yes.

23 THE COURT: And if you decide to appeal and you
24 can't afford an appeal or can't afford a lawyer, the
25 government will provide the funds for you to hire a lawyer

1 or pay for or give your lawyer and will also pay the costs
2 and expenses of the appeal. Do you understand those rights
3 you have?

4 THE DEFENDANT: Yes.

5 THE COURT: All right. I think there is still
6 Count 2 of the superseding indictment outstanding.

7 MR. PAULSEN: I move to dismiss that count at this
8 time.

9 THE COURT: And without objection, that motion
10 will be granted.

11 There was a forfeiture issue and I think -- has
12 that been satisfied totally at this point? I know I signed
13 off on the stipulation concerning the ownership of that gun.

14 MR. PAULSEN: Yes, I saw that order. I think it's
15 been resolved, Your Honor.

16 THE COURT: Is there going to be anything else on
17 the other gun?

18 MR. PAULSEN: I don't believe so.

19 THE COURT: Okay. So that should be all, right?

20 MR. PAULSEN: Yes.

21 THE COURT: All right. Do you want to say
22 anything or anything more about -- I'm not going to grant
23 the motion to allow voluntary surrender.

24 Anything else that should come before the court?

25 MR. GRAY: May I talk to my client for just a --

1 THE COURT: You may.

2 (Defendant and his attorney are speaking.)

3 MR. GRAY: Your Honor, could we have Rochester?
4 Could you designate Rochester?

5 THE COURT: I did. I said I would.

6 MR. GRAY: Oh, did you? Okay.

7 THE COURT: I said I would recommend it, you know.
8 And I hope you tell your client just because the judge
9 recommends it, it doesn't mean it is going to happen.

10 MR. GRAY: No. I understand.

11 THE COURT: As a matter of fact, I think maybe it
12 was you that told me one time -- it was either you or one of
13 your cohorts that told me one time that they'd just as soon
14 not have a recommendation, because if you make a
15 recommendation the Bureau of Prisons for sure won't do it,
16 but otherwise by luck you might get it.

17 So, Mr. Howell, just so you know, the chances of
18 you getting into Rochester are not --

19 THE DEFENDANT: Guaranteed.

20 THE COURT: Not biddable. Let's put it that way.

21 THE DEFENDANT: Okay.

22 THE COURT: Anything else?

23 MR. PAULSEN: Not from the government.

24 MR. GRAY: No, Your Honor. Thank you.

25 THE COURT: All right. Court's going to stand in

1 recess until 2:30.

2 THE CLERK: All rise.

3 (Court adjourned at 2:26 p.m., 4-18-2016.)

4 * * *

5 I, Renee A. Rogge, certify that the foregoing is a
6 correct transcript from the record of proceedings in the
7 above-entitled matter.

8 Certified by: /s/Renee A. Rogge
9 Renee A. Rogge, RMR-CRR

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